90-1838

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL LUSKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL S. LIEBERMAN
Counsel of Record
DIMURO, GINSBERG and LIEBERMAN, P.C.
921 King Street
Alexandria, Virginia 22314
(703) 684-4333

BENJAMIN F.L. DARDEN, Esquire
215 North Cayuga Street
Ithaca, New York 14850
(607) 273-0617

QUESTIONS PRESENTED

1. Whether Travelling In Interstate Commerce With Intent That A Murder-for-hire Be Committed Thereafter In violation of 18 U.S.C. §1952A, Now 18 U.S.C. §1958, Meets The Congressional Test Of A "Crime Of Violence" For Purposes Of 18 U.S.C. §924(c) (Use Or Carrying Of A Weapon During Crimes Of Violence And Drug Trafficking)?

2. Whether Multiple, Consecutive, Non-parolable Sentences Of 5 Years Incarceration Is Permissible Under 18 U.S.C. §924(c) Where A Defendant's Liability Arises Solely Under The Pinkerton Doctrine Based Upon A Co-conspirator Carrying Weapons During and In Relation To A Conspiracy And The Objects Thereof?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.....	2
STATEMENT	5
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	37
APPENDIX:	
Opinion, United States v. Luskin (4th Cir. 1991).....	A-1
Order, United States v. Luskin (D.Md 1989)	A-35
Memorandum, United States v. Luskin (D.Md 1989)	A-36
Opinion, United States v. Luskin (4th Cir. 1989)	A-40

TABLE OF AUTHORITIES

CASES:	PAGE
Bell v. United States, 349 U.S. 81 84, (1955)	35
Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948)	28
Gomez v. United States, 593 F.2d 210, 214 (3d Cir.) (en banc) cert denied, 441 U.S. 948 (1979) ...	29
Ladner v. United States, 358 U.S. 169, 178 (1958)	29
Luskin v. United States, Slip Op. 88-5068 (4th Cir. 1989), cert. denied, __ U.S.__, 110 S. Ct. 1807, 108 L.Ed. 2d 937 (1990)...	8
McBoyle v. United States, 283 U.S. 25 (1931)	35
McDonald v. Moinet, 139 F.2d 939 (6th Cir. 1944).....	28
Pinkerton v. United States, 328 U.S. 640 (1946)	Passim
Prince v. United States, 352 U.S. 322, 328, (1957)	29
Rollins v. United States, 543 F.2d 575 (5th Cir. 1976)	33
Simpson v. United States, 435 U.S. 6 (1978)	36

TABLE OF AUTHORITIES
(Cont.)

CASES: **PAGE**

United States v. Bass, 404 U.S. 336 (1971) 35

United States v. Batchlder, 442 U.S. 114, 121 (1978) 36

United States v. Busic, 446 U.S. 389 (1980) 27

United States v. Cardiff, 344 U.S. 174 (1952) 35

United States v. Chalan, 812 F.2d 1302, 1317 (10th Cir. 1987).... 34

United States v. Clements, 471 F.2d 1253 (9th Cir. 1972) 32,33

United States v. Corson, 448 F.2d 544 (3d Cir. 1971) 27,30

United States v. Cruz, 805 F.2d 1464, 1469 (11th Cir. 1986) ... 21

TABLE OF AUTHORITIES
(Cont.)

CASES: **PAGE**

United States v. Edick, 603 F.2d 771 (9th Cir. 1979) 33

United States v. Henry, 878 F.2d 937 (6th Cir. 1989) ..... Passim

United States v. Jones, 487 F.2d 676 679 n.1 (9th Cir. 1973) 33

United States v. Jones, 487 F.2d 676 679 n.1 (9th Cir. 1973) 33

United States v. Kaplan, 588 F.2d 71 74-75 (4th Cir. 1978) 33

United States v. Luskin, 926 F.2d 372 376 (4th Cir. 1991) 6

United States v. Ortiz-Martinez, 557 F.2d 214, 216 (9th Cir.) cert. denied., 429 U.S. 1110 (1976) 33

Uited States v. Phillips, 732 F.Supp. 255 262 (D. Mass, 1990) 23

United States v. Tankersley, 492 F.2d 962, 969 (7th Cir. 1974).. 33

TABLE OF AUTHORITIES
(Cont.)

CASES: **PAGE**

United States v. Torres, 862 F.2d 1025 (3rd Cir. 1987) ..... Passim

CONSTITUTION, STATUTES AND REGULATIONS:

18 U.S.C. §371 5

18 U.S.C. §924(c) ..... passim

18 U.S.C. §1952 ..... passim

18 U.S.C. §1952A ..... passim

18 U.S.C. §2101 22

18 U.S.C. §3156(a)(4)(B)..... 15

26 U.S.C. §5845(a)(7), 5861(d) and 5871 6

28 U.S.C. §1254 2

28 U.S.C.§2255 ..... 2, 8

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90- _____

PAUL LUSKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals (App. 1 - 34, infra) is officially published at 926 F.2d 372 (4th Cir. February 27, 1991). The District Court's memorandum opinion denying petitioner's petition pursuant to 28 U.S.C. §2255 is unpublished. (App 35 - 39, infra). The Fourth Circuit's original opinion denying petitioner's direct appeal of his conviction is not officially published and is included in the appendix. (App. 40 - 66 infra).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered February 27, 1991. (App. 1, infra). The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Section 924(c), Title 18, United States Code, in effect at the time of petitioner's offense, states, in pertinent part, as follows:

§924(c):

> (1) [w]hoever, during and in relation to any crime of violence or drug trafficking crime,, including a crime of violence or drug trafficking crime, which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years.... In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment

for ten years.... Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and -

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 1952A, Title 18,[1] United States Code, which was in effect at the time of petitioner's offense, states as follows:

> **§1952A. Use of interstate commerce facilities in the commission of murder-for-hire**
>
> (a) Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility in interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than five years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more then twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both ...

---

[1]. In 1988, this section was redesignated as 18 U.S.C. §1958.

STATEMENT

Petitioner PAUL LUSKIN was named in a twelve count indictment charging conspiracy to commit murder and various related charges. The indictment charged that in or about January, 1987 and continuing to in or about October, 1987, petitioner participated in a conspiracy to murder his wife, Marie Luskin, with James Liberto, Joseph Liberto and Milton "Sonny" Cohen. (Count 1 - 18 U.S.C. §371). In Counts 2, 3, and 4 the defendants were charged with traveling and causing others to travel in interstate commerce in the commission of murder for hire on March 9, 1987, May 30, 1987 and July 27, 1987, in violation of 18 U.S.C. §1952A. In counts 5, 6 and 7 the defendants were charged with carrying or causing the carrying of a firearm during and in relation to a crime of violence on March 9, 1987, May 30, 1987 and July 27, 1987, in violation of 18

U.S.C. §924(c). Counts 8-12 contained other related offenses.[2]

After a three week trial, all the defendants were convicted on all counts. While no evidence was presented that Paul Luskin ever personally travelled in interstate commerce or personally carried a firearm during a crime of violence, he was nevertheless convicted of these offenses under the Pinkerton[3] doctrine, because he, as a member of the conspiracy, was liable for the acts of his of coconspirators. See United States v. Luskin, 926 F.2d 372, 376 (4th Cir.

---

[2]. These include charges specific to only Cohen and Liberto, (illegal possession of firearm by convicted felon) as well as possession of unregistered firearm in violation of 26 U.S.C. §5845(a)(7), 5861(d) and 5871, which all defendants were convicted of having violated.

[3]. Pinkerton v. United States, 328 U.S. 640 (1946).

1991) (App. 12).[4]

On April 29, 1988, Paul Luskin was sentenced by the District Court to a term of incarceration for 35 years, 15 years of which were determined to be mandatory minimum sentences under 18 U.S.C. §924(c), and without parole. Specifically, the Court sentenced Mr. Luskin as follows:

Count 1:	(Conspiracy) 5 years;
Count 2:	(interstate travel on March 9, 1987) 10 years to run concurrent with Count 1;
Count 3:	(interstate travel on May 30, 1987) 5 years to run concurrent with Count 1 and consecutive to Count 2;
Count 4:	(interstate travel on July 27, 1987) 5 years to run

[4]. Indeed, this was the precise reasoning of the Fourth Circuit in upholding petitioner's convictions under 18 U.S.C. §924(c). (App. 63-64).

concurrent with Count 1 and consecutive to Count 2 and 3;

Count 5, 6, 7: (Carrying firearm during and in relation to crime of violence) 5 years to run consecutive to all others Counts and one another without parole;

Count 11: (unregistered firearm) 5 years to run concurrent with Counts 1 through 4.

On September 19, 1989 the Fourth Circuit upheld Mr. Luskin's convictions, and on April 16, 1990, this Court denied Luskin's Petition for Certiorari. Luskin v. United States, Slip Op. 88-5068 (4th Cir. 1989), cert. denied, ___ U.S.__, 110 S. Ct. 1807, 108 L.Ed.2d 937 (1990).

Meanwhile, while Mr. Luskin's case was on appeal, petitioner's counsel filed a Motion pursuant to 28 U.S.C.§2255 contending therein that Mr. Luskin's sentence under §1952A and

§924(c) were illegal, and that, at worst, the "§924(c) violations should be consolidated and treated as a single offense for purposes of sentencing."

On November 30, 1989 the District Court issued an Order and memorandum opinion without any hearing or argument, denying appellant's Motion. (App. 36 - 39). On December 13, 1989, the District Court denied petitioner's Motion for Reconsideration.

On February 27, 1991, the Court of Appeals for the Fourth Circuit denied Mr. Luskin's appeal. The Fourth Circuit held that because Luskin had been convicted of multiple §924(c) charges under the Pinkerton doctrine, under the plain language of the statute he must serve each sentence consecutive to each other. The Court stated:

> [i]n this case, there were three "crimes of violence" because Cohen made three attempts on Marie's life. On each occasion, Cohen

> carried a gun. As we held in the first appeal of this case, because Luskin was a co-conspirator in the scheme that produced these acts, he is liable for each of the attempted murders and for each of the attendant subsection 924(c) charges.

(App. 17)

The Court of Appeals concluded:

> [i]n essence, Luskin is asking this Court to legislate from the bench by adding this provision of subsection 924(c): "If a person is convicted on multiple subsection 924(c) counts merely because of his participation in a conspiracy, and if that person did not personally violate subsection 924(c), then each of that person's sentences pursuant to this subsection shall run concurrently to each other and consecutively to all other sentences." The statute does not contain words to that effect and this Court does not have the power to make such an amendment.

(App. 19)

The Court of Appeals also rejected Luskin's argument that his section 1952A offenses for travelling in interstate commerce with the intent to commit murder for hire is

not a "crime of violence" as defined by Congress for purposes of its application as a predicate offense for his §924(c) sentences. The Court merely noted that, "Sonny Cohen violated section 1952A by travelling in interstate commerce three times with the intent to commit murder. This conduct certainly threatened the use of violence, and it poses a "substantial risk" to Marie Luskin". (App. 32).

REASONS FOR GRANTING THE WRIT

The issues raised by Petitioner in this Petition are of great importance and have general application. Moreover, the Petitioner raises issues that require this Court's clarification for both the lower courts and for the United States government.

The issue of what constitutes a "crime of violence" is an issue commonly being raised

before the lower court's. Here, the court below misapplied the Congressional definition of a "crime of violence" and instead, adopted an approach that expands the reach of Federal criminal law into subject matter areas that have been traditionally the province of the states and which Congress intended to leave for state enforcement.

The second issue raised by this Petition, whether petitioner must receive consecutive sentences for multiple convictions of §924(c) involves a question that has divided the lower courts and has apparently caused confusion within differing offices of the United States Attorney. Indeed, in denying petitioner's appeal here, the Fourth Circuit held that a contrary decision in the Third Circuit, in United States v. Torres, 862 F.2d 1025 (3rd Cir. 1987), was an "aberration" and specifically declined to follow it since the

Court could not see "any basis for the outcome" of the Third Circuit's opinion. Yet, in that very case, the United States Attorney conceded that the Torres court outcome was appropriate. Moreover, in concurring with the Sixth Circuit case of United States v. Henry, 878 F.2d 937 (6th Cir. 1989), the Fourth Circuit below criticized the Henry United States Attorney's appreciation of the scope of §924(c), stating, "the prosecution had misunderstood the working of §924(c) and accordingly, had failed to seek an appropriate indictment." This Court's intervention is needed to clarify this important issue. The Fourth Circuit's decision below permits, under the Pinkerton doctrine, mandatory, consecutive, non-parolable sentences for individuals who choose not to carry weapons, but who wind up as co-conspirators with others who do carry weapons. The Fourth Circuit's

decision below expands the potential punishment under §924(c) well beyond Congress' intent. The continued use of §924(c) consecutive sentencing under the Pinkerton doctrine by the United States results in incredibly draconian multiple punishments arising from singular criminal offenses, participation in a conspiracy.

I.

In order for an individual to be convicted under 18 U.S.C. §924(c), it is necessary for the United States to prove that the defendant's use or carrying of a firearm was "during and in relation to a crime of violence or drug trafficking crime."

The term "crime of violence" was originally defined by Congress in CCCA, §1001(a), which is now found at 18 U.S.C. §16. It reads:

[t]he term "crime of violence" means -

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The 1986 amendment to §924(c), Pub.L. 99-308 §104(a)(2)(f); 100 Stat. 456, includes the identical definition of crime of violence. See §924(c)(3). This provision was enacted on May 19, 1986. See also 18 U.S.C. §3156(a)(4)(B) (Bail Reform Act).

The 1984 legislative history regarding the use of the term "crime of violence" for purposes of §924(c) states: "[i]n essence the term includes any offenses in which the use of physical force is an element and any felony which carries a substantial risk of such

force. Thus, the section expands the scope of predicate offenses, as compared with current law, by including some violent misdemeanors, but restricts it by excluding non-violent felonies." 1984, U.S.Code Cong. and Admin. News at 3491.

The legislative history also sets out some examples of crimes that have force or threats as an element of the offense. The Committee Report states that these would include "a threatened or attempted simple assault or battery on another person."[5] The Report notes that "offenses such as burglary in violation of a State law and the

---

[5]. Later, the Committee noted that this section was intended to also reach bank robbery and assault on federal officers, although both statutes have their own enhanced punishments in situations where they are committed with a dangerous weapon. The Committee stated "these are precisely the type of extremely dangerous offenses for which a mandatory punishment for the use of a firearm is the most appropriate." 1984 U.S. Code Cong. and Admin. News at 3490.

Assimilative Crimes Act" would be included under §16(b) "inasmuch as such an offense would involve the substantial risk of physical force against another person or against the property." 1984, U.S.Code Cong. and Admin. News at 3487.

The offense defined in 18 U.S.C. §1952A does not qualify as a crime of violence under either 18 U.S.C. §924(c)(3)(A) or (B). As noted in the legislative history:

> [t]he gist of the offense is the travel in interstate commerce, or the use of the facilities of interstate commerce or of the mails with the requisite intent and the offense is complete whether or not the murder is carried out or even attempted. (emphasis added).

1984, U.S. Code Cong. and Admin. News at 3485.

Accordingly, §1952A does not have as an element the use, attempted use or threatened use of physical force against another. The only actus reas included in a §1952A violation is "travel", and "use of facilities of

interstate commerce or of the mails." So long as these acts are committed with the requisite mens rea, the crime is complete. No physical force against another is contemplated in the commission of the acts being criminalized, (e.g. the travel, the use of the mails). Section §1952A does not, therefore, include the use, attempted use or threatened use of physical force as an element of the offense.

The Court below applied the wrong test in determining whether section 1952A has as an element the threatened use of physical force against the person of another. The Court held that the travels of Sonny Cohen in interstate commerce with the intent to commit murder threatened the use of violence. The opinion makes it clear that the Court was reviewing the actual conduct of Sonny Cohen in determining whether the requirements of §924(c)(3)(A) were met. However, actual

conduct involved is not the definitional test set up by Congress for determining whether a specific crime is a "crime of violence." Of course, Congress could have enacted such a test, but it did not. Instead, Congress required that a crime have as an element the use, attempted use or threatened use of physical force against another. Crimes that have as an element the threatened use of physical force are commonplace in the United States Code. Just by way of example, the following offenses enacted by Congress, have threats of violence against another as an element:

-18 U.S.C. section 871: Threats Against President and Successors to the President;

-18 U.S.C. section 875 (b)(c)(d): Interstate Communications;

-18 U.S.C. section 876: Mailing Threatening Communications;

-18 U.S.C. section 877: Mailing Threatening Communications from Foreign Country;

-18 U.S.C. section 891 et. seq: Extortionate Credit Transactions;

-18 U.S.C. section 245 (b): Federally Protected Activities;

-18 U.S.C. section 844 (e): Penalties (Explosive Materials);

-18 U.S.C. section 1503: Influencing or Injuring Officer or Juror Generally;

-26 U.S.C. section 7212 (a): Attempts to Interfere With Administration of Internal Revenue Laws;

-15 U.S.C. section 1692(d) (1): Harassment or Abuse (in Debt Collection);

-40 U.S.C. sections 193f(b)(6) and 193m(5): Acts of Physical Violence on Capitol Grounds and Buildings Security;

-42 U.S.C. section 3631: Violations; Bodily Injury; Death; Penalties (Fair Housing);

In contrast, 18 U.S.C. section 1952A does not contain any requirement that the United States prove any threats of violence as an element of

the offense.

The other inquiry mandated by Congress is to determine whether §1952A, by its nature, involves a substantial risk of the use of physical force in its commission.[6]

The Court below overlooked the requirement of §924(c)(3)(b) that the nature of the criminal offense involve a substantial risk that physical force will be used against a person in the course of committing the offense. Again, the Fourth Circuit's apparent focus was upon the actual conduct of Sonny Cohen when he made his attempts upon the life of Marie Luskin after his travel to Florida. There is no evidence in the record that any force was used or that any risk of force existed during the commission of the offense

---

[6] As noted by the Court in United States v. Cruz, 805 F.2d 1464, 1469 (11th Cir. 1986), the "by its nature" language, on its face is ambiguous.

that was used as the predicate offense in this case, that is, travelling in interstate commerce with the intent to commit murder. Congress defined the predicate offense for section 924(c) application very narrowly. Of course, Congress could have defined a crime of violence as any offense that precedes the actual use of violence, or which is a step toward the commission of actual violence upon another, or in which violence is thereafter performed, attempted or threatened. Indeed, in several statutes, Congress his defined criminal offenses by focusing upon acts that precede violence, so long as violence is thereafter performed or attempted. For instance, Section 2101, title 18, United States Code prohibits travel in interstate or foreign commerce and use of any facility of interstate or foreign commerce, to incite, organize or aid and abet a riot if the person

"either during the course of any such travel or use or thereafter performs or attempts to perform [said act]". (emphasis added). Section 1952, Title 18, United States Code (Interstate Travel or Transportation In Aid Of Racketeering Enterprises), similarly includes within its scope conduct following the prohibited travel by including as an element "and thereafter performs or attempts to perform" the prohibited acts. Congress, however, for purposes of section 924(c), required that the risk of physical force occur "in the commission of the crime of violence," not afterward. See also United States v. Phillips, 732 F.Supp. 255, 262 (D. Mass, 1990) (where under the identical definition of crime of violence under the Bail Reform Act, the court held that "risks of violence arising subsequent to the Commission of the offense are not within the ambit of ... [the]

definition of crimes of violence.") Here, the violence would have to occur in the course of the interstate travel.

While it may well be appropriate for Congress to amend §1952A, now §1958, to include offenses where violence ultimately occurs after the predicate offense, until Congress so acts, a crime of violence remains defined by the elements of the predicate offense and by the substantial risk of physical force occurring in the commission of the predicate offense. While there may well be situations where an offense under section 1952A would create a substantial risk of physical force during its commission, that is a rarity, and was not the case here.

The Court below clearly misconstrued the offense defined by §1952A. The Court opined that "one could hardly conceive of a more cold-blooded violent act than murder-for-

hire." 926 F.2d at 379. Earlier, the Court stated:

> [a]s we held in the first appeal of this case, because Luskin was a coconspirator in the scheme that produced these acts, he is liable for each of the attempted murders and for each of the attendant subsection 924(c) charges. (emphasis added).

926 F.2d at 376. Murder for hire and attempted murder, however, were not the predicate offenses for the §924(c) sentences. Instead, travelling in interstate commerce with the intent to commit murder for hire under 18 U.S.C. §1952A was the predicate offense. The elements of murder for hire and attempted murder differ significantly from travelling in interstate commerce with intent to commit murder for hire, and the substantial risks involved in the course of the commission of each offense likewise differ significantly. Under the then existing statutory scheme, §1952A is not a crime of violence and

petitioner's three §924(c) convictions should be reversed.

II.

Luskin received three consecutive, non-parolable five year sentences based upon his conviction on three §924(c) gun offenses. Luskin received these sentences because he was held liable for the three offenses under the Pinkerton doctrine because he was a member of a conspiracy during which Sonny Cohen made three attempts on Marie Luskin's life and on each occasion, Cohen carried a gun. Assuming Luskin was properly convicted of the §924(c) charges, Luskin should have received but one sentence for the §924(c) convictions.

In the present case, Luskin was involved in a single conspiracy with a singular purpose, which was to kill Marie Luskin. It was this crime, the conspiracy, which was the

necessary prerequisite for Luskin's multiple convictions of §924(c). Without the conspiracy, Luskin could not have been convicted of the crimes committed by Cohen. Thus, it is the fact that Cohen carried the weapons during and in relation to the conspiracy which forms the basis of Luskin's liability (under Pinkerton) and his multiple punishments. Absent any nexus to the conspiracy, only Cohen could have been convicted of the multiple §924(c) offenses.

It has been universally agreed among the Courts that generally a defendant can not be given multiple sentences under federal criminal statutes as punishment for what is, at best, a single crime. See United States v. Busic, 446 U.S. 389 (1980); United States v. Corson, 448 F.2d 544 (3d Cir. 1971); Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); McDonald v. Moinet, 139 F.2d 939 (6th Cir.

1944).

In United States v. Torres, 862 F.2d 1025 (3rd Cir. 1987), a defendant was convicted based upon a singular episode of events that occurred on October 16, 1987. The defendant was charged with two counts of 18 USC §924(c) violations, in addition to drug related charges. One of the §924(c) crimes was for using a firearm during a drug trafficking crime, and the second for using a firearm in assaulting a federal officer. In Torres, the Court held that the sentence on the §924(c) counts were duplicitous and remanded for entry of a general sentence on those counts, stating that only one sentence was permissible. In addition, the Court held that the convictions on both counts were proper but for sentencing purposes, the Court noted that "the government has stipulated that only one sentence may be imposed in this

case for violation of section 924(c)(1)". United States v. Torres, 862 F.2d at 1032. The Torres' court remanded the case back to the trial court with an admonition that "although the law allows separate and discrete offenses to be charged, it does not permit separate and discrete sentences to be imposed, when Congress did not intend double punishment." Id. at 1032 citing, Gomez v. United States, 593 F.2d 210, 214 (3d Cir.) (en banc), cert denied, 441 U.S. 948 (1979). See also Ladner v. United States, 358 U.S. 169, 178, (1958); Prince v. United States, 352 U.S. 322, 328, (1957). The proper procedure is to impose a general sentence for a term not exceeding the maximum permissible sentence on the count that carries the greatest maximum sentence. United States v. Corson, 449 F.2d at 555.

Using the Third Circuit's reasoning, and

the government's own concession in Torres, the sentence imposed in the case sub judice should have been one general sentence, and not three separate and discrete consecutive sentences.

The Fourth Circuit, apparently unable to otherwise distinguish Torres, called the Third Circuit decision an "aberration", and stated "since we can see no basis for the outcome in Torres, we decline to follow it." 926 F.2d at 378.

The Sixth Circuit, in United States v. Henry, 878 F.2d 937 (6th Cir. 1989), found that multiple §924(c) sentences were improper where each arose from the same underlying offense. In Henry, the appellant possessed multiple weapons, one on his person and others in his house, in relation to drug trafficking. The Court found that since the underlying offense was the same for each firearm, it was not material that there were multiple

firearms, for purposes of §924(c). The Court required that there be multiple underlying offenses to permit multiple convictions under §924(c).[7]

The Fourth Circuit below stated that the Henry case "drives home the add-on nature of subsection 924(c)" and that "the Court noted that it was possible that the defendant could have been charged with two separate drug trafficking crimes, and in these instances, multiple subsection 924(c) sentences would have been permissible." The Fourth Circuit stated that in Henry "the prosecution had misunderstood the working of §924(c) and, accordingly, had failed to seek an appropriate

---

[7]. The Henry court specifically reserved judgment as to whether it agreed with the Torres court (862 F.2d at 1032) which "by implication at least, concluded relative to multiple section 924(c)(1) offenses that "the law allows separate and discrete offenses to be charged, [but] does not permit separate and discrete sentences to be imposed . . ." 878 F.2d at 944.

indictment." 926 F.2d at 378. Nonetheless, Henry requires that a defendant's §924(c) liability arise from multiple and separate crimes. Luskin's liability arises solely from his participation in the conspiracy. If he were involved in multiple, separate conspiracies, the multiple, separate consecutive sentencing would have been appropriate. But, he was charged with and proof was adduced regarding only one conspiracy.

In United States v. Clements, 471 F.2d 1253 (9th Cir. 1972) it was held that while there is not any constitutional impediment to Congress' authorizing cumulative sentences for a single act that may violate more than one statute, when the offenses created by the statutes are not identical, it is necessary to go farther. Unless a court can find from the fact of the statute or from its legislative

history a clear indication that Congress intended to authorize multiple punishments for a single transaction, the court is obliged to construe them as being against the harsher penalties that result from cumulative punishments.

Various courts have concurred with the conclusion of the Clements court that a court should not permit multiple punishment for single episodes of criminal conduct without a clear statement from Congress that this was its intent. See United States v. Edick, 603 F.2d 771 (9th Cir. 1979); United States v. Kaplan, 588 F.2d 71, 74-75 (4th Cir. 1978); United States v. Ortiz-Martinez, 557 F.2d 214, 216 (9th Cir.), cert. denied., 429 U.S. 1110 (1976); Rollins v. United States, 543 F.2d, 575 (5th Cir. 1976); United States v. Tankersley, 492 F.2d 962, 969 (7th Cir. 1974); United States v. Jones, 487 F.2d 676, 679 n.1

(9th Cir. 1973).

There is no clear indication from Congress that it intended multiple punishments under §924(c) by use of the Pinkerton doctrine for a singular episode of criminal conduct. To the contrary, §924(c) was enacted to impede professional criminals from carrying or using weapons, by making their punishments more severe with each subsequent conviction. Nothing in the legislative history of §924(c) "indicates that Congress foresaw or considered how a court should determine the number of single crimes of violence that have occurred in a single criminal transactions." United States v. Chalan, 812 F.2d 1302, 1317 (10th Cir. 1987).

As noted by the Court in Chalan:

> Where the statute and legislative history are not clear, we are governed by the principle of lenity: ["I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt

will be resolved against turning a single transaction into multiple offenses. . . " Bell v. United States, 349 U.S. 81, 84, (1955). . . [8]

---

[8]. In United States v. Bass, 404 U.S. 336 (1971) this Court set out the policies underlying the rule of lenity as follows:

> "[t]his principle is founded on two policies that have long been part of our tradition. First, 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' McBoyle v. United States, 283 U.S. 25 (1931) (Holmes, J.) See also United States v. Cardiff, 344 U.S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the oral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant . . .

114, 121 (1978); Simpson v. United States, 435 U.S. 6 (1978).

Under the Fourth Circuit's decision below, a person who belongs to a conspiracy can receive mandatory, multiple, consecutive, non-parolable sentences because other co-conspirators carry weapons in furtherance of the conspiracy. The potential reach of this case is enormous. Defendants who purposefully refrain from carrying weapons will nonetheless be convicted and severely punished because others whom they associate with are less cautious. Others, who might otherwise refrain from carrying weapons, may choose instead to carry weapons since they will be liable and be punished for the acts of their co-conspirators who are less restrained. The Fourth Circuit's expansive interpretation of §924(c) can have the precise opposite effect then was intended. It was for Congress, and not the Courts, to

It was for Congress, and not the Courts, to make this decision. Here, the Fourth Circuit's expanded application of the Pinkerton doctrine to the mandatory, consecutive, non-parolable provision of 18 U.S.C. §924(c) were not contemplated or authorized by Congress. Accordingly, this Court should grant the petition for a Writ of Certiorari to decide this important issue and to eliminate the confusing and apparent conflict in the lower Courts.

CONCLUSION

For the foregoing reasons, this Court should grant petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

PAUL LUSKIN
By Counsel

Counsel for Petitioner:

MICHAEL S. LIEBERMAN, Esq.
DiMURO, GINSBERG & LIEBERMAN
921 King Street
Alexandria, Virginia 22314
(703) 684-4333

BENJAMIN F.L. DARDEN, Esq.
215 North Cayuga Street
Ithaca, New York 14850
(607) 273-0617

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing was ~~mailed postage pre-paid~~ to Honorable Kenneth W. Starr, Solicitor General of the United States, United States Department Of Justice, Constitution Avenue & Tenth Streets, N.W., Washington, D.C., 20530, this 28th the day of May, 1991.

MICHAEL S. LIEBERMAN

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-7273

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

PAUL LUSKIN,
Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CR-87-478, CA-89-2431)

Argued: Nov. 2, 1990 Decided: Feb. 27, 1991

Before RUSSELL and MURNAGHAN, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Cacheris wrote the opinion, in which Judge Russell and Judge Murnaghan joined.

ARGUED: Michael S. Lieberman, DIMURO, GINSBERG & LIEBERMAN, P.C., Alexandria, Virginia; Benjamin F. L. Darden, LEGAL ASSOCIATES OF SOUTH FLORIDA, Miami, Florida, for Appellant. Gregg Lewis Bernstein, Assistant United States Attorney, Baltimore, Maryland for Appellee. **ON BRIEF:** Breckinridge L. Willcox, United States Attorney, Baltimore, Maryland, for Appellee.

CACHERIS, District Judge:

In 1989, this Court affirmed Paul Luskin's conviction on numerous charges relating to his attempt to have his estranged wife Marie Luskin killed. Shortly thereafter, Luskin was sentenced to a long prison term, and he has appealed this sentence. Among other things, Luskin has raised a question that has not being previously addressed by this circuit: when is it permissible to sentence a defendant to consecutive periods of imprisonment for separate convictions under 18 U.S.C. § 924(c)? That subsection prohibits the carrying or using of a firearm during a "crime of violence" or a "drug trafficking crime." As punishment, it provides for a fixed, mandatory and non-parolable term of imprisonment that must be served consecutive to any other sentence. Ultimately, we reject

Luskin's argument that he was improperly given consecutive sentences under subsection 924(c), and we also reject his other claims of error regarding sentencing.[1]

I.

Because the facts of this case were set forth in this Court's first opinion affirming the convictions, a sketch of the facts will suffice here. In early 1987, Luskin decided to arrange the murder of his wife Marie in order to avoid giving her a portion of his electronics empire as part of their divorce.

---

[1]. In addition to this appeal, in which Luskin has been represented by counsel, Luskin filed a notice of appeal pro se on September 26, 1990. This appeal is also directed toward Luskin's sentence, and it was docketed by the Clerk of the Court as case number 90-7387. We do not know why Luskin has filed an independent notice of appeal pro se, and Luskin has not stated any grounds for this separate appeal. Accordingly, we treat the present appeal by Luskin's counsel as Luskin's appeal of right in this case.

To that end, he contacted his friend Joe Liberto and told him of his desire to have his wife killed. Acting on that desire, Joe Liberto contacted his brother Jimmy, who in turn hired Milton "Sonny" Cohen to commit the murder. Cohen made his first attempt on March 9, 1987. He shot Marie in the head, but fortunately she lived. Cohen and confederate, James Manley, made further attempts on May 30, 1987, and July 27, 1987, and these were also unsuccessful. Shortly thereafter, Cohen and Manley were arrested, and Manley told all. His confession ultimately led to Luskin's conviction on numerous charges. These convictions were upheld by this Court. United States v. Luskin, No. 88-5068 (Sept. 19, 1989). Luskin petitioned for a writ of certiorari, and that petition was denied. United States v. Luskin, ___ U.S. ___, 110 S.Ct. 1807, 108 L.Ed.2d 937 (1990).

The following is a list of Luskin's convictions and the sentence imposed pursuant to each count:

Count I Conspiring with the Liberto brothers and Cohen to kill Marie, to carry a firearm in relation to this crime of violence, and to carry an unregistered firearm. 18 U.S.C. §371. The sentence was five years.

Count II Causing Cohen to travel in interstate commerce on March 9, 1987, with the intent to commit murder. 18 U.S.C. § 1952A. The sentence was ten years, to run consecutive to Count I.

Count III Causing Cohen to travel in interstate commerce on May 20, 1987, with the intent to commit murder. 18 U.S.C. § 1952A. The sentence was five years, to run concurrently Count I and consecutively to Count II.

Count IV Causing Cohen to travel in

interstate commerce on July 27, 1987, with the intent to commit murder. 18 U.S.C. §1952A. The sentence was five years, to run concurrently to Count I and consecutively to Counts II and III.

Count V Causing the carrying of a firearm in interstate commerce in relation to a crime of violence on March 9, 1987. 18 U.S.C. § 924(c). The sentence was five years, to run consecutively to all other counts, with no parole.

Count VI Causing the carrying of a firearm in interstate commerce in relation to a crime of violence on May 30, 1987. 18 U.S.C. § 924(c). The sentence was five years, to run consecutively to all other counts, with no parole.

Count VII Causing the carrying of a firearm in interstate commerce in relation to a crime of violence on July 27, 1987. 18

U.S.C. § 924(c). The sentence was five years, to run consecutively to all other counts, with no parole.

The remaining counts were gun charges that are not material to this appeal. The sentence for these other charges was five years, to run concurrently with Counts I through IV. In total, Luskin received a sentence of 35 years, 15 of which were not subject to parole. He has appealed this sentence on three grounds.

Luskin first argues that his sentences pursuant to Counts V, VI and VII should have run concurrently to each other, not consecutively. These were Luskin's three convictions for causing Cohen to carry a firearm when Cohen travelled in interstate commerce with the intent to kill Marie, in

violation of 18 U.S.C. §924(c).[2] There were

---

[2]. In pertinent part, the present version of 18 U.S.C. § 924(c) states:

(1) Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . . in the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

* * *

(3) For the purposes of this subsection the term "crime of violence" means an offenses that is a felony and --

(A) has an element the use, attempted use, or threatened use of physical force against the person or property of another, or

three subsection 924(c) counts (as well as three section 1952A counts) because there were three separate attempts on Marie's life. Among other things, subsection 924(c) requires the imposition of a non-parolable, mandatory minimum sentence that must run consecutively to all other sentences. Despite the language of subsection 924(c), Luskin contends that in his case concurrent sentences were required.

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing of offense.

Section 925(c)(1) was amended in 1988. Pub. L. 100-690, November 18, 1988, 102 Stat. 4359. The 1988 amendment raised the penalty for repeat violators of the statute to twenty years. In the version that was in effect at the time of the present crimes, the penalty for repeat violators was ten years. Arguably, the district judge should have sentenced appellant to one five-year and two ten-year consecutive terms of imprisonment for his convictions under Counts V through VII. However, since the United States has not counter-appealed on this point, we will not address it.

Luskin's argument runs like this: Congress did not intend to permit the sentencing of an individual to consecutive terms of imprisonment under subsection 924(c) when the offender, at base, has only committed one underlying "crime of violence." Admittedly, our law permits the prosecutor to carve up criminal conduct into many counts so that technical problems with the evidence will not allow the true criminal to walk free. However, when it comes time to impose a sentence, prison terms under separate counts that punish the same episode of criminal conduct must run concurrently. In this case, Luskin was sentenced to three consecutive five-year terms for causing Cohen to carry a gun during each of his three attempts to kill Marie. However, Luskin only commissioned the murder scheme one time, and it was Cohen's decision to attempt murder on three occasions.

Since Luskin only commissioned the murder attempt once, his subsection 924(c) gun charges must run concurrently. In sum, Luskin argues that one cannot receive consecutive subsection 924(c) sentences for one episode of criminal behavior, and that he only participated in one criminal episode -- hiring someone to kill his wife.

A.

We reject this argument. It misstates the law developed in other circuits regarding the imposition of consecutive sentences under subsection 924(c), and it also misstates the facts of this case.

First, Luskin's factual argument is untenable. At trial, it was proven that Luskin did more than commission the murder once and then wash his hands of the matter. For example, as this Court noted in its

opinion upholding Luskin's convictions, Luskin offered a $25,000 bonus prior to the third attempt on Marie's life provided that the murder was completed on or before July 28, 1987. In addition, Luskin could have called off the killers and prevented the multiple attempts on Marie's life at any point in the chain of crime. Furthermore, as noted and discussed infra, this Court upheld Luskin's convictions on the three subsection 924(c) counts because he was liable for them as a coconspirator under the Pinkerton doctrine. Because of that holding, this Court does not need to find that Luskin played an active role in each of the three murder attempts. Yet, we do believe that the evidence of Luskin's ongoing involvement in this murder-for-hire scheme was strong, and we reject Luskin's unsubstantiated factual contention to the contrary.

Second, Luskin's argument has been drawn from the case law of other circuits dealing with subsection 924(e), not subsection 924(c). Subsection 924(e) is a recidivism statute. It provides that if a person has been previously convicted of three or more "violent" felonies or "serious" drug offenses, and if that person is caught with a firearm that has ever been in interstate commerce (as prohibited by 18 U.S.C. § 922(g)), then the person shall receive a minimum mandatory prison term of fifteen years without parole and up to a $25,000 fine. The three requisite convictions must have been "committed on occasions different from one another." 18 U.S.C. § 924(e). The case law referred to by Luskin tackles the issue of when do convictions represent criminal acts that are "committed on occasions different from one another"? Most if not all of the circuits have interpreted

this phrase to mean that the three prerequisite convictions must represent three "'episodes' of felonious criminal activity that are distinct in time, rather than literal convictions." United States v. Towne, 870 F.2d 880, 889 (2d Cir.), cert. denied, 109 S.Ct. 2456 (1989) (the court in Towne cites cases from several other circuits for the same proposition).

In Towne, the defendant had been convicted twice of kidnapping and raping a woman. On both occasions, he had hitchhiked until he was picked up by a female driver, forced her at knife point to drive somewhere, and then raped her. In order to find the defendant liable under subsection 924(e), the trial court counted his rape convictions separately from his kidnapping convictions, so that he had four previous convictions for subsection 924(e) purposes. The Towne court

reversed, holding that each rape and kidnapping should count as one criminal episode, and since the defendant had only two previous criminal episodes, he was not covered by 924(e).

We express no opinion on the correct interpretation of subsection 924(e) or on the correctness of Towne, and we have commented on it only for the propose of distinguishing it. Unlike subsection 924(e), subsection 924(c) does not contain the phrase "committed on occasions different from one another," and thus we do not have a license to read that limitation into the language of 924(c).

B.

As the case law of other circuits demonstrates, there is no "episode" test under subsection 924(c) that is comparable to that limitation under 924(e).

The starting point of our analysis is the language of the statute. The plain language of a statute controls where it is not ambiguous and not unconstitutional. Touche Ross & Co. v. Redington, 442 U.S. 560, 569 (1979); Lewis v. United States, 445 U.S. 55, 61-62 (1980) (applies this rule to the U.S. Code provision prohibiting the possession of a firearm by a felon, which is not 18 U.S.C. § 922(g)(1)). There is no ambiguity in subsection 924 (c). It states that whenever a person commits a crime of violence or drug trafficking crime and uses or carries a gun, the person shall be sentenced to a prison term that runs consecutive to the person's sentence for the underlying crime of violence or drug trafficking crime and consecutive to all other sentences. Other circuits have agreed that there is no ambiguity in this subsection and that this is the only interpretation possible.

United States v. Nabors, 901 F.2d 1351, 1358 (6th cir. 1990); United States v. Fontanilla, 849 F.2d 1257, 1258 (9th Cir. 1988). In this case, there were three "crimes of violence," because Cohen made three attempts on Marie's life. On each occasion, Cohen carried a gun. As we held in the first appeal of this case, because Luskin was a coconspirator in the scheme that produced these acts, he is liable for each of the attempted murders and for each of the attendant subsection 924(c) charges. Accordingly, Luskin's three consecutive subsection 924(c) sentences must be upheld because they comport with the plain language of the statute.

Indeed, Luskin's argument that his 924(c) sentences must run concurrently because he only started the ball rolling on these murder attempts is an attempt to evade the nature of this Court's ruling in his first appeal. At

that time, Luskin argued that he could not be convicted of three 924(c) charges because the government never proved that he knew that a firearm would be carried during each attempt on Marie's life. In rejecting this argument, this Court held that under the doctrine stated in Pinkerton v. United States, 328 U.S. 640 (1946), "[a] conspirator may be liable for the overt acts of ever other conspirator done in furtherance of the conspiracy." Slip op. at 17. Thus, Luskin's argument in this appeal that he only committed one "crime of violence" for subsection 924(c) purposes ignores the basis on which his convictions under those counts were upheld; he is liable for those counts because he was a coconspirator. Indeed, this Court's previous determination that Luskin was liable for all three subsection 924(c) counts became the law of the case, and the Court will not reconsider that

previous ruling at this time.

In essence, Luskin is asking this Court to legislate from the bench by adding this provision to subsection 924(c) counts merely because of his participation in a conspiracy, and if that person did not personally violate subsection 924(c), then each of that person's sentences pursuant to this subsection shall run concurrently to each other and consecutively to all other sentences." The statute does not contain words to this effect, and this Court does not have the power to make such an amendment.

C.

As other circuits have noted, however, there is one important limitation on consecutive 924(c) sentences that is not contained within the wording of the statute -- the Constitution's prohibition against

double jeopardy. Luskin's argument that he has been sentenced to multiple and consecutive terms of imprisonment for only one crime sounds in double jeopardy. Because of this similarity, and given the prominent role that a double jeopardy analysis plays in subsection 924(c) sentences, we address the double jeopardy issue.

A double jeopardy problem can be lurking behind consecutive subsection 924(c) sentences due to the add-on nature of the statute. Every time someone commits a crime of violence while carrying a gun, an additional sentence for merely carrying the gun is tacked on to the sentence for the underlying "crime of violence." Quite often, for each count of the indictment that alleges a "crime of violence," there will be a related count charging a subsection 924(c) offense. The court must concern itself with whether the underlying

crimes of violence supporting the 924(c) charges are duplicative under a double jeopardy analysis. As long as the underlying crimes are not identical under the Blockburger analysis, then consecutive subsection 924(c) sentences are permissible.

The recent and significant holding in Grady v. Corbin, ___ U.S. ____, 110 S.Ct. 2084, 2090, does not affect this subsection 924(c) inquiry. The Double Jeopardy Clause actually creates several protections. It protects against successive prosecutions for the same offense, and against multiple prosecutions in one trial for the same offense. In Grady, the Supreme Court held that successive prosecutions are barred when both prosecutions require proof of the same "conduct." Yet, in this case we are only concerned with multiple punishment protection. In that instance, "the Double Jeopardy Clause

does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." Grady, 110 S.Ct. at 2091. The Blockburger test is the usual method of determining whether the legislature intended multiple punishments for the same episode of criminal conduct; as long as each crime "requires proof of an additional fact that the other does not," it is presumed that the legislature intended multiple punishments. United States v. Blockburger, 284 U.S. 299, 304 (1932). Notwithstanding, "[t]he Blockburger test is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." Grady, 110 S.Ct. at 2091, quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983). If it is otherwise evident that multiple punishments were intended then there is no double jeopardy problem.

In this instance, without a doubt, there were three distinct attempts on Marie's life. Thus, the three section 1952A convictions did not violate the Double Jeopardy Clause. Each of these counts refers to different conduct that took place in different months; the first murder attempt occurred on March 9, 1987, the second attempt occurred on May 30, 1987, and the final attempt occurred on July 27, 1987. In fact, it is interesting to note that the defendant has not challenged what he would have to challenge in order to prevail -- the consecutive sentences that he received for his three section 1952A convictions.

With one distinguishable exception, the other circuits that have considered this issue have held that only the Double Jeopardy Clause limits the availability of consecutive subsection 924(c) sentences. For example, in United States v. Chalan, 812 F.2d 1302 (10th

Cir. 1987), the defendant was convicted of armed robbery, of first degree murder, and of two subsection 924(c) counts (one for using a gun in the robbery and one for the murder). The armed robbery was a lesser included offense of the first degree murder charge, since the homicide became a first degree murder charge only because it was committed in the course of the robbery. The court held that because the robbery and murder charges were duplicative under a double jeopardy analysis, they were really one "offense." Since there was only one "offense," only one 924(c) sentence was proper.

Other circuits also have taken this same position; insofar as the underlying crimes of violence are not repetitive under a double jeopardy analysis, consecutive subsection 924(c) sentences are permissible. See Nabors, 901 F.2d at 1357-59 (Blockburger applied and

separate underlying crimes of violence found); Fontanilla, 849 F.2d at 1258-59 (since murder and assault were not the same under Blockburger test, defendant could receive two consecutive § 924(c) sentences).

One case from the Sixth Circuit drives home the add-on nature of subsection 924(c). In United States v. Henry, 878 F.2d 937, 942-45 (6th Cir. 1989), the government charged the defendant with two subsection 924(c) offenses based on the exact same drug trafficking crime only because the defendant carried two guns. The Henry court held that there must be a separate underlying crime for each subsection 924(c) charge; the number of guns is not the determining factor. The court noted that it was possible that the defendant could have been charged with two separate drug trafficking crimes, and in that instance, multiple subsection 924(c) sentences would

have been permissible. Yet, the prosecution had misunderstood the working of 924(c) and, accordingly, had failed to seek an appropriate indictment. 878 F.2d at 942-45.

Luskin heavily relies on United States v. Torres, 862 F.2d 1025 (3d Cir. 1988); however, that case is an aberration. In that case, the defendant had been convicted on two subsection 924(c) crimes -- one for using a fireame during a drug trafficking crime, and the second for using a firearm in assaulting a federal officer. The defendant was given consecutive sentences on these convictions. On appeal, the government conceded that only one firearm offense had taken place, and agreed that the sentences should run concurrently. The Torres court, without comment, honored this concession and ordered that the sentences on these two convictions run concurrently. We do not know why the

government made this concession in Torres, for it was apparently unnecessary. There were two distinct predicate 924(c) offenses: conspiracy to distribute cocaine and assaulting a federal officer. The 924(c) offenses were not violative of the Double Jeopardy Clause because each required proof of a different predicate crime. The Torres court did not make any comment on the law of subsection 924(c) and, thus, it did not create any analysis to be followed. Indeed, given the government's concession, any comment would have been dicta. Since we can see no basis for the outcome in Torres, we decline to follow it. Accordingly, we affirm the sentencing of Luskin to three consecutive subsection 924(c) terms of imprisonment.

D.

To avoid any confusion, we want to

emphasize what our holding does not mean. This ruling does not bar the government from obtaining an indictment that charges an individual with a crime of violence (or drug trafficking crime) and a lesser included offense, and also obtaining a subsection 924(c) count for each of those predicate counts. Instead, it merely prohibits the imposition of consecutive sentences for the two 924(c) counts, in the event that the defendant is convicted on both predicate offenses and gun counts. Under our judicial system, prosecutors are permitted to carve up criminal conduct into multiple counts, even if some of the counts are lesser included offenses or constitutionally identical offenses. There are two reasons for allowing the trial of an individual on repetitive counts. First, if it is uncertain that the jury will convict a defendant on a major

count, the prosecutor is allowed to obtain, in the alternative, a sure-fire conviction on a lesser included offense. Second, this allowance helps to prevent minor problems of proof on one count from allowing a genuinely guilty person to escape liability for his criminal conduct. the Double Jeopardy Clause does not force the prosecutor to gamble on obtaining the major conviction. Instead, the defendant can be indicted on both counts, and, if convicted on both, the Double Jeopardy Clause operates to require that the sentences on the two counts run concurrently. The better practice in the instance would be for the trial judge to strike the conviction on the lesser included offense and the related subsection 924(c) conviction. See Ball v. United States, 470 U.S. 856, 865-66 (1985).

III.

Luskin also argues that his section 1952A offenses are not "crimes of violence" and, thus, cannot serve as the predicates for his subsection 924(c) sentences.[3] We reject this argument.

---

[3]. Section 1952A was later redesignated without change as 18 U.S.C. § 1958. Pub. L. 100-690, November 18, 1988, 102 Stat. 4402. Section 1958 currently states, in pertinent part:

> (a) Whoever travels in or causes another . . . to travel in interstate or foreign commerce . . . with intent that a murder be committed in violation of the laws of any state or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, shall be fined not more than $10,000 or imprisoned for not more than ten years, or both; and if personal injury results, shall be fined not more than $20,000 and imprisoned for not more than twenty years, or both; and if death results, shall be subject to imprisonment for any term of years or for life, or shall be fined not more than $50,000, or both.

As a preliminary matter, Luskin should have raised this argument following his conviction, not his sentencing. In this instance, he is not arguing against the type of sentence that the district judge imposed; he is arguing that his convictions under subsection 924(c) are unsupportable. It is too late to make this argument now. Nonetheless, in order to remove any cloud from Luskin's conviction, we address this issue.

In support of his contention, Luskin notes that section 1952A does not penalize any violent criminal act; instead, it criminalizes the mere carrying of a firearm in interstate commerce with the intent to commit murder. This argument ignores the definition of a "crime of violence" under subsection 924(c):

> (3) For the purposes of this subsection the term "crime of violence" means an offense that is a felony and--
>
> (A) has as an element the use, attempted use, or threatened use of

> physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(Emphasis added.)

In the case at bar, Sonny Cohen violated section 1952A by travelling in interstate commerce three times with the intent to commit murder. This conduct certainly threatened the use of violence, and it posed a "substantial risk" to Marie Luskin. One can hardly conceive of a more cold-blooded violent act than murder-for-hire, and it was proven that Luskin and Cohen engaged in exactly that enterprise. Thus, the district judge correctly held that the section 1952A convictions constituted crimes of violence for the purposes of section 924(c).

IV.

Finally, Luskin argues that 18 U.S.C. § 924(c) and 18 U.S.C. § 1952A were not in effect at the time of the attempts of Marie's life, and that they did not come into effect until November 1, 1987. These sections were revised as part of the Comprehensive Crime Control Act of 1987 (the "Act"), which was enacted on October 12, 1984. Pub. L. No. 98-473, Tit. II, 98 Stat. 1976 (1984). This was a elephantine bill, encompassing many chapters. Chapter II of the Act contained the Sentencing Guidelines, and section 235(a)(1) of Chapter II stated that "this chapter shall take effect" on November 1, 1986. Enactment of the Sentencing Guidelines was delayed until November 1, 1987. Luskin argues that this effective date applied to all of the chapters of the Act, including the amendments to section 924(c) and 1952A, which were contained

in Chapter X of the Act.

Every court that has considered this argument his rejected it. See United States v. Robinson, 865 F.2d 171, 172 (8th Cir. 1989) (holding that subsection 924(c) came into effect on October 12, 1984, the date of enactment); United States v. York, 830 F.2d 885, 892 (8th Cir. 1987), cert. denied, 108 S.Ct. 1047 (1988) (same holding); United States v. Meyers, 847 F.2d 1408, 1414-16 (9th Cir. 1988) (effective date of another chapter was not delayed by effective date of the Sentencing Guidelines). We agree with these other circuits that the revisions to subsection 924 (c) became effective when they were enacted since no other effective date was specified for Chapter X.

Accordingly, the sentences imposed upon appellant Luskin are

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL LUSKIN	:	
	:	
v.	:	**NO. JFM-89-2431**
	:	
UNITED STATES OF AMERICA	:	
	:	

ORDER

For the reasons stated in the memoradum entered herein, it is, this 29th day of November 1989

ORDERED that this petition under 28 U.S.C. § 2255 be dismissed.

J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PAUL LUSKIN	:	
	:	
v.	:	**No. JFM-89-2431**
	:	
UNITED STATES OF AMERICA	:	
	:	

MEMORANDUM

Paul Luskin, who was convicted of a variety of offenses in this Court (and whose convictions have recently been affirmed by the Fourth Circuit), has filed a motion under 28 U.S.C. § 2255 (1971). He contends that two of the statutes under which he was convicted, 18 U.S.C. § 1952(a) (1984) (current version at 18 U.S.C. §1958 (1984 & Supp. 1989) (use of interstate commerce facilities in the commission of murder-for-hire) and 18 U.S.C. §924(c) (1976 & Supp. 1989) (carrying or causing the carrying of a firearm during and in relation to a crime of violence) were not in effect at the time of offenses were

committed.

Luskin contends that Chapter X of the Comprehensive Crime Control Act of 1984 - which first established the statutory provisions in questions - must be read in conjunction with Chapter II of the Act covering sentencing reform. According to petitioner, since Congress amended the effective date of Chapter II to November 1, 1987, the effective date of the other Chapters of the Act, including Chapter X, were extended tot he date as well. November 1, 1987 was beyond the period covered int he indictment filed against Luskin and his co-defendants.

It is true, of course, that Chapter II did not become effective until November 1, 1987. See Comprehensive Crime Control Act of 1984, ch. 58 § 235(a)(1), Pub. L. No. 98-473, 98 Stat. 2031 (1984); Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217,

Section 4, 99 Stat. 1728 (1985). However, there is no similar provision pertaining to Chapter X, and under the general rule of statutory construction that absent an express provision to the contrary, a provision takes effect on the date of its enactment, Chapter X became effective on October 12, 1984, when it was signed into law by the President. Comprehensive Crime Control Act of 1984, ch. 10, Pub. L. No. 98-473, 98 Stat. 2136 & 2138 (1984). See United States v. York, 830 F.2d 885, 892 (10th Cir. 1987), cert. denied, 108 S. Ct. 1047 (1988); United States v. Shaffer, 789 F.2d 682, 686 (9th Cir. 1986).

Luskin points to the fact that until it was reenacted as part of Chapter X, 18 U.S.C. § 924(c) could not be used to further enhance punishment for a crime under a statute which contained its own enhancement provision. See Busic v. United States, 446 U.S. 398, 404

(1980); Simpson v. United States, 435 U.S. 6, 16 (1975). However, Chapter X of the Act clearly converted the crime created by Section 924(c) to a separate, substantive offense, punishable in its own right. See United States v. Gironda, 758 F.2d 1201 (7th cir. 1985), cert. denied, 474 U.S. 1004 (1985). It therefore follows from this Court's holding that Chapter X became effective on October 12, 1984, that Luskin could be separately charged and convicted under Section 924(c).

A separate order dismissing this action is being entered herewith.

Date: November 29, 1989

J. Frederick Motz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5068

UNITED STATES OF AMERICA

versus Plaintiff-Appellee

PAUL LUSKIN

Defendant-Appellant.

No. 88-5068

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MILTON BACHMAN COHEN,
a/k/a Sonny Cohen

Defendant-Appellant.

No. 88-5072

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAMES J. LIBERTO

Defendant-Appellant.

No. 88-5074

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JOSEPH LIBERTO

Defendant-Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (Cr-87-478-JFM)

Argued:March 8, 1989 Decided:September 19, 1989

Before RUSSELL and MURNAGHAN, Circuit Judges, and STAKER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Andrew Graham (James Patrick Ulwick, Kevin F. Arthur, KRAMON & GRAHAM, P.A. on brief); Howard L. Cardin (CARDIN & GITOMER, P.A. on brief); Paul Weiss; Michael Stuart Libowitz (MOORE, LIBOWITZ & THOMAS on brief) for Appellants. Gregg Lewis Bernstein, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney on brief) for Appellee.

PER CURIAM:

In this case, a routine drug courier profile stop by the Baltimore City Police led to the discovery of a murder for hire scheme involving each of the named appellants (Paul Luskin, James Liberto, Joseph Liberto and Milton "Sonny" Cohen), all of whom were convicted by a jury of conspiracy to commit murder and various related weapons charges. These convictions stemmed from a plot to kill Luskin's wife.

Prior to trial, each of the appellants filed motions for severance asserting the potential for prejudice from antagonistic defenses. Luskin, in particular, sought severance on the basis that evidence admissible only against the other defendants might be improperly used against him. Cohen also filed a motion to suppress evidence seized at the time of this arrest. The

district court denied all motions for severance as well as the motion to suppress. After a four-week trial, the jury returned verdicts of guilty on all counts against each appellant. Lengthy jail sentences were imposed and a timely appeal was noted by each appellant. As we find no error on record to support a reversal of these convictions, we affirm.

I.

On July 30, 1987, Sonny cohen and James Manley were arrested at the train station in Baltimore, Maryland. Authorities in Baltimore had been alerted by AMTRAK security officials in Florida that the two men fit the drug courier profile. Specifically, Baltimore officials were advised that Cohen and Manley had purchased round-trip first class tickets with cash, stayed in Florida

less than one day prior to returning to Baltimore on a 24-hour train ride, and that Cohen had left a call-back number for his train reservation to an inoperative number.

Upon exiting the train, the two men were stopped by Baltimore City Police Detective McVicker and AMTRAK security guards and asked to produce identification. Manley was unable to do so and appeared visibly nervous. In fact, Detective McVicker testified that Manley was shaking and "seemed to be petrified." Suspicions aroused, Officer McVicker and the AMTRAK security guards escorted the two men to an interview room to subject their luggage to a dog sniff. The dogs reacted positively. The officers then obtained a search warrant, searched the luggage and found a loaded AR-15 rifle with a laser scope in Manley's luggage. In the bag carried by Cohen, two loaded pistols, a

silencer and 3-1/2 ounces of cocaine were found. Both men were then arrested.

Manley enter into a post-arrest plea agreement with the Government and upon his testimony the following facts were extracted:

Paul Luskin was involved in a long and bitter divorce proceeding with his wife Marie. At stake was the bulk of Luskin's assets including a successful Florida business. Rather than proceed with the divorce and risk losing such assets, Luskin resolved to have his wife killed. To such an end, Luskin contacted long-time associate Joe Liberto and advised him of his plan. Joe then contacted his brother Jimmy, also a business associate of Luskin, who in turn commissioned Sonny Cohen to kill Marie Luskin in Florida. Such services were to cost Paul Luskin $50,000.

Cohen traveled to Florida to carry

out the plan. On March 9, 1987, posing as a floral delivery man, Cohen gained entry to Marie Luskin's home and shot her in the head. She survived the wound. Fearing erroneously that during his failed attempt to kill her, Marie Luskin saw his face, Cohen recruited Manley to aid him in completing the murder contract. In May of 1987, the two traveled to Florida together, devised an elaborate scheme to finish their job, but ultimately failed.

Prior to the third and final attempt to kill Mrs. Luskin, Cohen told Manley that there would be a $25,000 bonus if the job were completed on July 28. Apparently, divorce proceedings between the Luskins were soon to begin and Paul Luskin wished to have the matter attended to prior to that time. However, this final attempt on Marie Luskin's life also resulted in failure, and upon return to Baltimore, the two were arrested.

Manley's testimony was corroborated by the Government's proffer of various telephone bills, hotel registration forms and credit card receipts. At trial, all appellants denied participation in this murder for hire scheme. Luskin asserted that Cohen and the Liberto brothers were involved in a large scale drug distribution operation in which he had no part. Jimmy Liberto asserted that evidence offered by the Government against him that he often traveled to Florida and owned the gun found in Manley's luggage showed little more than legitimate business travel and a desire for self protection. Joe Liberto asserted that an evidence against him showed only legal activity. Finally, Sonny Cohen asserted that because no one could positively identify him as Marie Luskin's assailant on March 9, there was insufficient evidence to support his

conviction.

II.

Each appellant claims error in the trial court's denial of his motion for severance on the ground of antagonistic defenses. Fed.R.Civ.P. 8 permits joinder of defendants in one indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Under this rule, the appellants here were properly named in one indictment as they were all charged with conspiracy to murder Luskin's wife.

Ordinarily, persons properly joined in an indictment are to be tried together. United States v. Parodi, 703 F.2d 768, 779 (4th Cir. 1983). This is especially true where the indictment charges a conspiracy, or a crime having a principal and aider-abetters.

United States v. Spitler, 800 F.2d 1267 (4th Cir. 1986); United States v. Kuhn, 381 F.2d 824, 838 (7th Cir.); Cert. denied, 389 U.S. 1015 (1967). However, "[i]f it appears that a defendant . . . is prejudiced by a joinder of defendants in an indictment or for trial together, the [district] court may grant a severance of defendants or provide whatever relief justice requires." Fed.R.Crim.P. 14 (emphasis added). "[T]he mere presence of hostility among defendants, . . . or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials. . . " United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 91977), quoting United States v. Barker, 442 F.2d 517, 530 (3d Cir.), cert. denied, 404 U S. 958 (1971). Therefore, "[a]ntagonistic defenses do not per se require severance even

if the defendants. . . attempt to cast blame on each other." United States v. Spitler, supra, at 1271, quoting United States v. Becker, 585 F.2d 703, 707 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979).

Case law makes it readily apparent that motions for severance are rarely granted. United States v. Keck, 773 F.2d 759 (7th cir. 1985). A defendant must show more than merely that a separate trial would offer him a better chance of acquittal." United States v. Parodi, supra, at 780. Further, "[t]he decision to deny severance, which is within the sound discretion of the district judge, will not be overturned unless the defendant affirmatively demonstrates a clear abuse of discretion through having been deprived of a fair trial and having suffered a miscarriage of justice." United States v. Spitler, supra, at 1271-1272. See also Person

v. Miller, 854 F.2d 656, 665 (4th Cir. 1989), cert. denied, 104 S.Ct. 1119 (1989). Where severance is sought "on the ground of conflicting defenses [,] it must be demonstrated that the conflict is so prejudicial that the differences are irreconcilable, and that the jury will unjustifiably infer that this conflict alone demonstrated that [all] are guilty." Becker, supra at 707, quoting Ehrlichman, 546 F.2d at 929 and United States v. Robinson, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In this case, none of the appellants has made the requisite showing of abuse of discretion by the district court. Each appellant was able to put forth his theory of the case and present evidence to support such a theory. When necessary, limiting instructions were rendered by the district judge to limit any potential prejudice inherent in witness

testimony. Such cautionary instructions cleared the way for the jury to make individual guilt determinations. United States v. Parker, 821 F.2d 968, 972 (4th Cir. 1987), cert. denied, 108 S.Ct. 1108 (1988). Had the jury believed the evidence proffered by the appellants, verdicts of acquittal would certainly have been rendered. However, in the light of overwhelming evidence against each appellant, the jury was certainly well within this province to convict each appellant on all counts. Nowhere has it been demonstrated that the antagonistic defenses alone resulted in conviction.

Further, Luskin's contention that his case should have been severed because of the prejudicial effect of "spillover" evidence must also fail. See United States v. Lawson, 780 F.2d 535 (6th Cir. 1985) (per curiam). Here, Luskin was named in each count of the

indictment and was in fact the driving force behind this entire scheme. Any evidence as to the activity of other defendants merely points to the extent of the criminal activity in pursuing this criminal plan. Such evidence was essential to the prosecution and was properly admitted.

II.

Appellant Cohen contends that the trial court committed reversible error in denying his motion to suppress the evidence seized at the Baltimore Train Station (two loaded pistols, a silencer, and 3-1/2 ounces of cocaine). This contention, too, is without merit.

Not all police-citizen contact invokes the Fourth Amendment. Terry v. Ohio, 392 U.S. 1 (1968). There are three levels of police-citizen encounters: (1) communication between police or citizens involving no

coercion or detention and therefore without the compass of the Fourth Amendment; and (2) so-called Terry stops or brief "seizures" that must be supported by reasonable suspicion; and (3) full scale arrests that must be supported by probable cause. United States v. Galberth, 846 F.2d 983 (5th Cir.), cert. denied, 109 S.Ct. 167 (1988), quoting United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982). Here, we believe that the officers in this case acted within the bounds of the law at each level of their encounter with Cohen and properly seized both the weapon and the cocaine from him.

At the first level, there is no element of detention or coercion, and the Fourth Amendment is not implicated. Florida v. Royer, 460 U.S. 491, 497 (1983) (mere approach by law enforcement agents, identifying themselves as such, does not

constitute a seizure). The second level involves brief detentions and requires "reasonable suspicion" on the part of the law enforcement official based upon "specific and articulable fact which, taken together with rational inferences from these facts, reasonably warrants an intrusion." Terry v. Ohio, supra, at 19. The third level, arrest, requires the existence of probable cause. New York v. P.J. Video, 475 U.S. 868 (1986). Here, the totality of the circumstances shows that the officers acted within the bounds of the established law when questioning, searching and ultimately arresting Cohen at the Baltimore Train Station at each level of police-citizen contact. The first level was the officers' approach of Cohen and Manley. The second level was the officers' detention of the two to subject their bags to a dog sniff. The principal issue here is whether or

not the officers were armed with the requisite quantum of reasonable suspicion that Cohen's luggage contained contraband to justify the dog sniff. Here, the officers had been alerted that Cohen and his traveling companion fit the "drug courier profile." Each elected to return from Florida by train, a 24-hour ride, after staying in Florida (a known drug distribution center) for less than one day. Finally, Manley was recognizably nervous when he spoke to the Baltimore officers. See e.g., United States v. Mendenhall, 446 U.S. 544 (1980).

> When an officer's observation lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry and its progeny permits the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope.

United States v. Place, 462 U.S. 696, 706

(1983).

Here, the detention to subject the bags to a dog sniff was sufficiently limited in scope under Terry and did not violate Cohen's Fourth Amendment rights. See, e.g. United States v. Whitehead, 849 (4th Cir.), cert. denied, __ U.S. ___ (1988).

Once the dogs reacted positively, the detectives were armed with the requisite probable cause and were justified in detaining the two until a search warrant could be executed legitimizing the third level of this police citizen encounter. Michigan v. Summers, 452 U.S. 692 (1981); United States v. Whitehead, supra, at 853. Accordingly, the evidence was both properly seized and admitted at trial.

III

Finally, Appellant Luskin contends that the Government failed to adduce

substantial independent evidence of a conspiracy of which Luskin was a member, rendering the trial court's admission of co-conspirator declarations under Fed.R.Evid. 801(d)(2)(E). Specifically, Luskin objects to the court's admission of testimony of Sonny Cohen that directly linked Luskin to this murder for hire scheme.

Fed. R.Evid. 801(d)(2)(E) allows for the admission of statements made by a co-conspirator if made during the course and in furtherance of the conspiracy, as an exception to the rule against hearsay.

However, before a court can admit a co-conspirator's statement the district court must be satisfied that the statement actually falls within the definition of the rule. There must be evidence that there was a conspiracy involving the declarant and the non-offering party and that the statement was

made in furtherance of the conspiracy. Existence of the conspiracy and the defendant's involvement in it are preliminary questions of fact which must be resolved by the district court before any statement under the co-conspirator exception is to be admitted. Fed.R. Evid. 104. See Bourjaily v. United States, 107 S.Ct. 2775 (1987).

In making a preliminary factual determination as to the existence of a conspiracy, the court may examine the hearsay statements sought to be admitted. Bourjaily, 107 S.Ct. 2781-2782. See also Glasser v. United States, 315 U.S. 60 (1942). This is true because the co-conspirator exception to the rule against hearsay is so firmly rooted in the jurisprudence that the court need not independently inquire into the reliability of such statements. Bourjaily, at 2783. If by a preponderance of the evidence a conspiracy

is found to exist, statements by co-conspirators are admissible. Id. "The preponderance standard ensures that before admitting evidence, the court will have found it i[s] more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration." Id. at 2779.

In this case, the Government introduced a plethora of evidence to show both that a conspiracy existed and that Paul Luskin was an active participant in it. The Government concedes that much of this evidence was circumstantial, but, as we recently held in United States v. Jackson, 863 F.2d 116, 1173 (4th Cir. 1989), such evidence is of equal probative value as direct evidence. That evidence is:

(1) Cohen knew prior to his second attempt to kill Marie Luskin that she would be

at Bennigan's Restaurant in Hollywood, Florida on July 29, 1987 at a specific time. Marie Luskin was to be at such location to host a dinner meeting for a recently formed single parents support group. Also in attendance at such meeting was Susan Davis the then-girlfriend of Paul Luskin. At trial, Ms. Davis testified that upon receipt of the invitation to such meeting, she informed Paul Luskin about it and indicated that his wife would be in attendance. Considering the fact that both Liberto and Cohen are Baltimore residents, it is a reasonable inference that they gained the information about Ms. Luskin's movements from Paul Luskin.

(2) The first attempt of Mrs. Luskin's life occurred about 10:00 a.m. on March 9, 1987. Within the hour, a telephone call was forwarded from the Marco Polo Hotel, where Sonny Cohen was a registered guest, to

Pellucci's Restaurant in Baltimore, owned and operated by Jimmy Liberto. Five minutes later there was a call from Pellucci's to Joe Liberto's home in Florida. One minute after that call ended, there was a call from Pellucci's to Paul Luskin's home in Baltimore. Shortly thereafter, Luskin placed a call from his car telephone to his home in Florida where his wife's aunt answered the phone. Although Marie Luskin had at this time already been shot, the aunt who answered the telephone did not so inform him. Luskin then immediately placed a call to Pellucci's Restaurant. Again, the reasonable inference to be drawn from this evidence when coupled with events of the day is that Luskin was in fact involved in the conspiracy.

These are only two examples of evidence introduced by the Government upon which the district court made preliminary

determination as to the existence of a conspiracy for the purpose of rendering admissible a co-conspirator's statements. We are satisfied that the Government did show, as they must, by a preponderance of the evidence, that a conspiracy existed. Accordingly, the testimony of Sonny Cohen was therefore properly admitted at trial by the district court. See Bourjaily v. United States, supra.

We can quickly dispose of Luskin's final two arguments raised here on appeal. First, Luskin contends that the Government failed to introduce any evidence that he was a aider or abettor in causing a firearm to be carried during the commission of a crime of violence. As such, according to Luskin, his conviction under 18 U.S.C. §924(c), which renders criminal the carrying of a firearm during the commission of a violent crime, must fall. Specifically, Luskin argues that

because the Government failed to prove that Luskin knew that firearms were to be carried and used by those he hired to kill his wife, his conviction was improper.

In charging the jury, the district judge explained:

> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.
>
> In order to aid and abet another to commit a crime, it is necessary that the defendant willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about, that is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed.

Essentially, Luskin's argument is that such an instruction is an improper extension of the Pinkerton doctrine, so named for the holding in Pinkerton v. United States, 328 U.S. 640 (1946). Such doctrine holds that

each conspirator may be liable for the overt acts of every other conspirator done in furtherance of the conspiracy.

Section 924(c) had been held to apply even if a conspirator had no knowledge that another conspirator was in possession of a gun. See United States v. Brant, 448 F.Supp. 781, 782 (W.D. Pa. 1978); United States v. Gironda, 758 F.2d 1201 (7th Cir.), cert. denied, 474 U.S. 1004 (1985).

In this case, there was ample evidence that those hired by Luskin carried guns in furtherance of their objective in this conspiracy and that it was Luskin's desire that such objective be carried out. Accordingly, Luskin was properly convicted under 18 U.S.C. §924 (c) here.

Finally, Luskin argues that he is entitled to a reversal due to the Government's improper use of derogatory comments about

Luskin's character during rebuttal closing argument. Luskin contends that the following colloquy so prejudiced him that he was denied his right to a fair trial:

> GOVERNMENT COUNSEL: Ladies and gentlemen, this case is about greed, its about arrogance, its about violence. Mr. Allen [defense counsel] claims that Paul Luskin would not plot to murder his wife and the family. Paul Luskin has lived his life, ladies and gentlemen, without regard to others, with regard--
>
> DEFENSE COUNSEL: O b j e c t i o n . there is no evidence of that.
>
> THE COURT: Just strike that go ahead, Mr. Stollers.
>
> DEFENSE COUNSEL: I ask that it be stricken.
>
> THE COURT: I just struck it, Mr. Allen.

We review the entirety of the prosecutor's remarks under the Fed.R.Crim.P. 52 (a) harmless error rule to determine "whether it is more probable than not that the

improper remarks materially affected the verdict." United States v. Prantil, 764 F.2d 548, 556 (9th Cir. 1985). Upon review, we are satisfied that such a statement, properly struck by the district court, was not so egregious as to deny the appellant a fair trial. See, United States v. Weatherless, 734 F.2d 179, 182 (4th Cir.), cert. denied, 469 U.S. 1088 (1984); United States v. Karas, 624 F.2d 500, 506 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981).

In light of the overwhelming evidence against the appellant, we find this isolated incident had no prejudicial effect upon the
outcome of this trial.

Having reviewed all the claims of error and found them without merit, the judgments of conviction herein are

AFFIRMED.